



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 20, 1996

Ms. Linda Wiegman
Office of the General Counsel
Texas Department of Health
100 West 49th Street
Austin, Texas 78756-3199

OR96-1727

Dear Ms. Wiegman:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 35662.

The Texas Department of Health (the "department") received a request for information relating to a Medicaid managed care pilot program. Apparently, the only information at issue is a health care proposal submitted by the National Heritage Insurance Company ("NHIC"), which is a subsidiary of Electronic Data Systems. You state that NHIC has asserted that the proposal is confidential under section 552.110 of the Government Code.

As provided by section 552.305 of the Open Records Act, this office provided NHIC the opportunity to submit reasons as to why the information at issue should be withheld. NHIC has identified portions of its proposal that are not confidential and may be disclosed. We assume that the records identified as not confidential were provided to the requestor. NHIC asserts that the remaining portions of the proposal are excepted from disclosure pursuant to section 552.104 and 552.110 of the Government Code.

Section 552.104 excepts "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect a *governmental body's interests* in a particular commercial context by keeping some competitors or bidders from gaining unfair advantage over other competitors or bidders. Open Records Decision No. 541 (1990) at 4. However, generally neither the contract nor information submitted with a bid is excepted under section 552.104 once the bidding process is over and a contract awarded. *Id.* at 5. As the department has not raised section 552.104 nor indicated that it is applicable in this situation, the information at issue is not excepted from disclosure pursuant to section 552.104.

Section 552.110 provides an exception for “[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.” Section 552.110 refers to two types of information: (1) trade secrets, and (2) commercial or financial information that is obtained from a person and made privileged or confidential by statute or judicial decision. Open Records Decision Nos. 639 (1996); 592 (1991) at 2. We note that NHIC has not shown that the submitted information comes within the commercial or financial aspect of section 552.110. A “mere conclusory assertion of a possibility of commercial harm” is insufficient to show that the applicability of section 552.110. Open Records Decision No. 639 (1996) at 4. “To prove substantial competitive harm,” as Judge Rubin wrote in *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir. 1985), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted), “the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure.”

In regard to the trade secret aspect of section 552.110, this office will accept a claim that information is excepted from disclosure under the trade secret aspect of section 552.110 if a prima facie case is made that the information is a trade secret and no argument is submitted that rebuts that claim as a matter of law. Open Records Decision No. 552 (1990) at 5; *see* Open Records Decision No. 542 (1990) (governmental body may rely on third party to show why information is excepted from disclosure).

The Texas Supreme Court has adopted the definition of the term “trade secret” from the Restatement of Torts, section 757 (1939), which holds a “trade secret” to be

any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business. . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list or specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958).

The following criteria determines if information constitutes a trade secret:

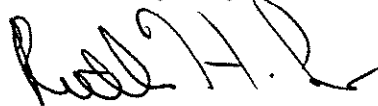
(1) the extent to which the information is known outside [the owner's business]; (2) the extent to which it is known by employees and others involved in [the owner's] business; (3) the extent of measures taken [by the owner] to guard the secrecy of the information; (4) the value of the information to [the owner] and to [its] competitors; (5) the amount of effort or money expended by [the owner] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Id. See also Open Records Decision No. 522 (1989).

We note that trade secret information also is "information that is not publicly available or readily ascertainable by independent investigation." *Numed, Inc. v. McNutt*, 724 S.W.2d 432, 434 (Tex. App.--Ft. Worth 1987, no writ). NHIC has made a prima facie case that most of the information at issue is protected from disclosure under the trade secret prong of section 552.110. See Open Records Decision No. 363 (1983) (third party has a duty to establish how and why exception protects particular information). We have marked the information that is not the type of information protected as a trade secret under section 552.110. We have also marked the information at issue that may be withheld from disclosure

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Records Division

RHS/ch

Ref.: ID# 35662

Enclosures: Submitted documents

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